

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 996

INTRODUCER: Senator Perry

SUBJECT: Administrative Proceedings

DATE: April 3, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	<b>Pre-meeting</b>
2.			AGG	
3.			AP	

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**I. Summary:**

SB 996 requires the administrative law judge, unless otherwise provided by law, to award attorney's fees and costs to the prevailing party in a proceeding to cancel or modify a permit having the effect of authorizing the development of land. However, the administrative law judge is not required to make this award against the party that challenged the permit if the challenge was substantially justified or special circumstances exist that would make the award unjust.

If the order awarding fees and costs is appealed, the court hearing the appeal may, in its discretion, award additional fees and costs for the appeal. However, the total fees and costs awarded may not exceed \$50,000.

**II. Present Situation:**

An administrative law judge must award the prevailing party attorney fees and under several circumstances, which are specified in different statutes.

**Attorney's Fee Recovery in Any Administrative Case (s. 57.105(5), F.S.)**

In any administrative proceeding, an administrative law judge (ALJ) must award a reasonable attorney's fee to be paid to the prevailing party, if the losing party should have known its case was not supported by the facts or the law.

More precisely, an ALJ must award the prevailing party a reasonable attorney's fee and damages<sup>1</sup> if the ALJ finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the ALJ or at any time before trial:

- Was not supported by the material facts necessary to establish the claim or defense; or

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<sup>1</sup> The fee and damages must be paid in equal parts by the losing party and his or her attorney.

- Would not be supported by the application of then-existing law to those material facts.<sup>2, 3</sup>

An ALJ must also order damages caused by anything a party did primarily for the purpose of unreasonable delay. These damages include the attorney's fee incurred in obtaining the order.<sup>4, 5</sup>

#### **Attorney's Fee Recovery in Case Challenging Agency Action (s. 120.595, F.S.)**

Additionally, in a challenge to an action of a state agency that involves disputed issues of material facts, the final order must award reasonable costs<sup>6</sup> and reasonable attorney's fees to the prevailing party if the ALJ determines that the non-prevailing adverse party<sup>7</sup> participated in the proceeding for an "improper purpose." And improper purpose means participation in a proceeding that is primarily:

- To harass or to cause unnecessary delay;
- For frivolous purpose; or
- To needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

#### **Attorney's Fee Recovery in Proceedings Initiated by a State Agency (s. 57.111, F.S.)**

The "Florida Equal Access to Justice Act" is codified in s. 57.111, F.S. Under this section, unless otherwise provided by law, a prevailing small business party shall be awarded attorney's fees and costs unless the actions of the state agency were "substantially justified."<sup>8</sup> And a state agency's proceeding is substantially justified "if it had a reasonable basis in law or fact at the time it was initiated by a state agency."<sup>9</sup>

This statute pertains to actions that are "initiated by a state agency."<sup>10</sup> And its purpose is to diminish the deterrent effect of seeking review of, or defending against, governmental action by awarding a "prevailing small business party" an award of attorney's fees and costs in certain

<sup>2</sup> Section 57.105(1) and (5), F.S.

<sup>3</sup> See s. 57.105(3), F.S., for exceptions.

<sup>4</sup> Section 57.105(2) and (5), F.S.

<sup>5</sup> See s. 57.105(3), F.S., for exceptions.

<sup>6</sup> See the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions for further information about the costs that may be taxed to the losing party. Fla. R. Civ. P. Appendix II.

<sup>7</sup> See s. 120.595(1)(e)3., F.S., for the precise, very long definition of non-prevailing adverse party.

<sup>8</sup> Section 57.111(4)(a), F.S. Fees and costs also may not be awarded if special circumstances exist that would make the award unjust.

<sup>9</sup> Section 57.111(3)(e), F.S.

<sup>10</sup> "Initiated by a state agency" means that the state agency:

- Filed the first pleading in a court in this state;
- Filed a request for an administrative hearing; or
- Was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency. Section 57.111(3)(b), F.S.

situations.<sup>11, 12</sup> The maximum attorney's fees and costs recoverable under the Equal Access to Justice Act is \$50,000.

### **Attorney Fees: The American Rule and the English Rule**

When courts discuss the issue of recovery of attorney's fees from an opposing party, they often speak of the American Rule and the English Rule. The American Rule is that "attorney's fees incurred while prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing their recovery."<sup>13</sup> In contrast, the English Rule is that "attorney fees are taxed to the losing party as part of costs . . . ."<sup>14</sup> The issue of which system is preferable is debated in legal academia. Some argue that the American Rule is more egalitarian or democratic, allowing less-wealthy people to bring an action without fear of having to pay the prevailing party's hefty legal fees, as well as their own. However, others believe this concern is outweighed by the benefits of the English Rule, which discourages a person from bringing weak cases, including those meant only to harass an opponent.

### **III. Effect of Proposed Changes:**

The bill requires the administrative law judge in an administrative proceeding, unless otherwise provided by law, to award attorney's fees and costs to the prevailing party in a proceeding to cancel or modify a permit having the effect of authorizing the development of land. However, the administrative law judge is not required to make this award against the party that challenged the permit if the challenge was substantially justified or special circumstances exist that would make the award unjust.

If the order awarding fees and costs is appealed, the court hearing the appeal may, in its discretion, award additional fees and costs for the appeal. However, the total fees and costs awarded may not exceed \$50,000.

### **Actions Against Land Development "Permits"**

Though the bill pertains only to administrative actions to cancel or modify a "permit," the bill defines this term broadly as "any permit or other official action of state government having the effect of authorizing the development of land." As such, it appears this may include not only a typical "building permit" but also many other governmental actions including a zoning decision that changes a piece of land from a conservation area to a commercial district.

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<sup>11</sup> "Prevailing small business party" means a small business party that is in one of the following circumstances:

- "A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;
- "A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or
- "The state agency has sought a voluntary dismissal of its complaint." Section 57.111(3)(c), F.S.

<sup>12</sup> See s. 57.111(3)(d), F.S., for the definition of small business party.

<sup>13</sup> *Bidon v. Dep't of Prof'l Regulation*, 596 So. 2d 450, 452 (Fla. 1992).

<sup>14</sup> *Bell v. U.S.B. Acquisition Co.*, 734 So. 2d 403, 406 (Fla. 1999).

### **Mandatory Awards for Cases Settled, Voluntarily Dismissed, or Taken to Final Order**

The bill mandates the awarding of attorney's fees and costs not just in actions that are tried to final order but also to those that settle or are voluntarily dismissed under certain circumstances.

Regarding settled actions, to trigger the award, the settlement must be "favorable to the [prevailing] party on the majority of issues that such party raised during the course of the proceeding." Also, in a settlement that would trigger the award, the bill does not expressly authorize the parties to negotiate away the mandatory fees and costs award. However, it does not prohibit them from doing so, or from including a provision prohibiting the prevailing party from filing a motion for fees.

Regarding voluntary dismissals, a party initiating a challenge to a permit must voluntarily dismiss the challenge within 30 days to avoid liability for the other party's attorney fees and costs.

The bill takes effect on July 1, 2017

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

The bill could have a positive impact on developers by discouraging unmeritorious administrative actions challenging permits relating to land development. These actions may be costly in many ways, including lost revenue from delayed projects and the payment of the developers' own attorney fees and costs.

**C. Government Sector Impact:**

The bill could cause a reduction in the number of administrative actions of the type contemplated in the bill and thus a decreased caseload for administrative law judges. On the other hand, some actions could be extended to litigate whether attorney fees and costs should be awarded and, if awarded, how much the award should be.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 57.111, 379.502, and 403.121.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.